Supreme Court, U.S.
FILED

No. 94-1831 MAY 5 1995

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In The Supreme Court Of The United States

OCTOBER TERM, 1994

BILLIE H. ALLEN, et al.,[1]

Petitioner,

v.

PAINEWEBBER, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Harold J. Bender*
BIFULCO, BENDER & SCARPITTI
1300 G. Daniel Baldwin Building
Erie, PA 16501
(814) 452-2271

Counsel for Petitioner
****Counsel of Record***

Wayne G. Johnson
GIFFORD, LAY & JOHNSON
558 West Sixth Street
Errie, PA 16507
(814) 452-6468

Counsel for Petitioner

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

QUESTION PRESENTED

1. Whether the split of authority between the circuits relative to their interpretation of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure § 15 based on a substantive/ procedural dichotomy serves the best interest of the investing public in attempting to resolve disputes between investors and the brokerage industry; in this specific case, whether the ruling of the Fourth Circuit Court of Appeals affirming the lower circuit court's dismissal effectively interpreting § 15 as a statute of limitations should be reversed.

[1]Billie H. Allen; Eleanor K. Benson, a/k/a Eleanor K. Fuller; Charles Brotman; Elizabeth Domino; Joseph S. Domino; Ruth H. Gray; Bruce G. Harris; Edith B. Harris, Constance N. Kalkhof, Barbara B. Lewis, Robert Hall Lewis; Joan F. McDonald; Marie O. Newberger; Gertha Pollard; Linda M. Safyan; Vernon Lee Thompson; Charles J. Toner, Jr.; Delores Weinberger; Hal Weinberger, a/k/a Harold Weinberger

and

E. Jean Metcalf,
Withdrawn Petitioner

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OPINIONS BELOW

On April 29, 1993 the United States District Court for the Eastern District of Virginia, Richmond Division, entered a Memorandum Opinion denying Petitioners' rights to proceed to arbitration under the National Association of Securities Dealers Code of Arbitration Procedure. (Civil Action No. 3:92CV591)

Appeal was taken to the Fourth Circuit Court of Appeals and argued October 27, 1993. The Court decided the case January 10, 1995, affirming the lower court's opinion. (#93-1575)

A petition for rehearing was filed and the rehearing denied February 6, 1995, and a Mandate issued February 13, 1995.

JURISDICTION

The decision of the Fourth Circuit Court of Appeals and its denial of rehearing on February 6, 1995, denied the petitioners their right to proceed to arbitration. Thus, the Court has jurisdiction under Supreme Court Rules, Rule 10.1.(a) and 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE

On July 17, 1992, the Petitioners, Billie H. Allen and other claimants, filed a consolidated statement of claim with the National Association of Securities Dealers, Inc. (NASD) arising out of their purchase of PaineWebber Equity Partners I - Limited Partnership. Prior to filing any answer, the Respondent filed a motion to dismiss, asserting that pursuant to NASD Code of Arbitration Procedure ("Code"), § 15 more than six years had elapsed from the event or occurrence giving rise to petitioners' claims. This argument is founded on the date of purchase being the event or occurrence giving rise to the claim. An amended complaint was filed raising issues pursuant to the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, et. seq. No discovery occurred in

the case, but a stipulation of certain facts and publicly available documents was entered into to assist the Court in understanding the generic background of the case.

The essence of the Petitioners' claims as investors in the limited partnership was that the Respondent failed to disclose or adequately disclose information about the investment and that Respondent then committed wire fraud and mail fraud by sending out information indicating that the investment was performing consistent with its sales literature when in fact it was not meeting those standards.

ARGUMENT

I. THE COURTS CONTINUE TO BE DIVIDED AS TO WHETHER THE COURT OR THE ARBITRATORS DECIDE WHETHER A CLAIM IS SUBJECT TO ARBITRATION UNDER THE SIX YEAR ELIGIBILITY REQUIREMENT OF NASD CODE OF ARBITRATION PROCEDURE § 15.

The Third, Sixth, and Seventh Circuits hold that the question of eligibility is a question for the courts to decide.[1] The majority of circuits, the Second, Eighth, Ninth, Eleventh and the District of Columbia, find that eligibility is a question for the arbitrators.[2]

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[1] PaineWebber Inc. v. Hartmann, 921 F.2d 507 (3rd Cir. 1990); Roney & Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992).

[2] Automotive, Petroleum and Allied Industries v. Town and Country Ford, 709 F.2d 509 (8th Cir. 1983); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982), partially abrogated on other grounds; O'Neel v. National Association of Securities Dealers, Inc., 667 F.2d 804 (9th Cir. 1982);

(continued...)

Prior to its decision in this case, the Fourth Circuit was believed to have been in the majority of circuits in holding that arbitrability was an issue for the arbitrators.[3]

The basis for the majority of circuits' holdings is in large part that the language of the NASD Code of Arbitration Procedure § 35 provides the arbitrators with authority to interpret the Code. Additionally, these decisions rely heavily on the fact that the Federal Arbitration Act (FAA) is to be liberally construed.

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[2](...continued)
Conticommodity Services Inc. v. Philipp & Lion, 613 F.2d 1222 (2nd Cir. 1980); and Hanes Corp v. Millard, 531 F.2d 585 (D.C. Cir. 1976).

[3]Miller v. Prudential Bache Securities Inc., 884 F.2d 128 (4th Cir. 1989), cert. denied, 497 U.S. 1004, 110 S. Ct. 3240 (1990).

While this Court in AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643, 648, 106 S.Ct. 1415, 1418, 89 L.Ed.2d 648 (1986) reaffirmed that the question of arbitrability is usually an issue to be decided by the courts, it also indicated that, if the parties had clearly and unmistakably provided otherwise, then the issue was not for the courts. The Respondent is a member of NASD and as such bound by its Code of Arbitration Procedure. If a public customer then chooses that Code of Arbitration Procedure as its vehicle to resolve disputes between the customer and the brokerage firm, all parties are bound by the entire Code of Arbitration Procedure.

This Court indicated its preference for arbitration as a way to reduce the

time burdens of the court system in AT & T Technologies, supra.

This Court established its deference to arbitration in security cases in Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987); and further indicated that RICO actions were appropriate in Rodriges de Quijas v. Shearson/American Express, 490 U.S. 477 (1989).

The industry, in an attempt to limit its exposure even in arbitration, has attacked securities purchasers via the use of Code § 15. Certain circuits have bought into the industry's position. In the interim, the NASD has unequivocally indicated that Code § 15 "never was intended to serve as an election of remedy provision that would eviscerate any surviving causes of action under applicable law after six years have

elapsed." SEC Rel. No. 34-34442, 57 S. E. C. Docket 614, 1994 WL 398693 at *6 (July 26, 1994).

The Respondent has, like its industry brethren, attempted to make the six year eligibility requirement for NASD arbitration into a statute of limitations based on date of purchase. Code § 15 says:

> **Time Limitation on Submission**
> **Sec. 15.** No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction. [Amended effective October 1, 1984.]

The language of § 15 does not specifically say "date of purchase," a phrase common in the securities industry

and various security acts. Instead, it addresses the "occurrence or event giving rise to the ... claim ...." What occurrence or event triggers the eligibility period is an issue for the arbitrators. Code § 35 says:

> **Interpretation of Provisions of Code and Enforcement of Arbitrator(s) Rulings**
>
> **Sec. 35.** The arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code and to take appropriate action to obtain compliance with any ruling by the arbitrator(s). Such interpretations and actions to obtain compliance shall be final and binding upon the parties. [Amended November 16, 1992.]

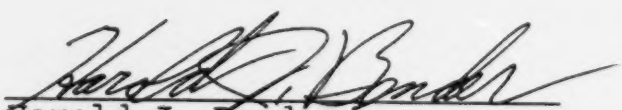
Code § 35 provides for the panel to "... interpret and determine the applicability of all provisions under this code ...." While an interpretation of the Code is the appropriate subject of review under the FAA if abuse of discretionary powers is asserted after an arbitration

hearing, such review is significantly different than a court becoming involved at the beginning of an arbitration procedure without authority to do so. The result of the respondent's, and the industry as a whole's, use of Code § 15 is to get the court system involved immediately in an interpretation of Code § 15 as opposed to reviewing a completed arbitration on limited grounds. This attempt to use Code § 15 as a defensive weapon eviscerates this Court's predilection in favor of arbitration. As such this Court is reqested to resolve the split among the circuits in favor of the petitioners and investor claimants in arbitration procedures.

CONCLUSION

WHEREFORE, for the reasons set forth by Petitioner Billie H. Allen, et al, counsel respectfully requests this Court to overturn the Fourth Circuit Court of Appeals and remand this case directly to NASD arbitration.

Respectfully submitted,

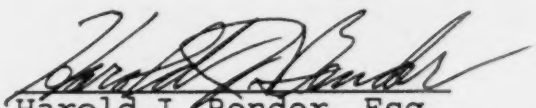


Harold J. Bender
(Counsel of Record)
Bifulco, Bender & Scarpitti
1300 G. Daniel Baldwin Bldg.
Erie, Pennsylvania 16501
(814) 452-2271
Counsel for Petitioner

Wayne G. Johnson
Gifford, Lay & Johnson
558 West Sixth Street
Erie, Pennsylvania 16507
Counsel for Petitioner

PROOF OF SERVICE

In accordance with Rule 29(3)(c) of the Rules of the United States Supreme Court, I hereby certify under penalty of perjury that on this 5th day of May, 1995 three (3) copies of this Petition for a Writ of Certiorari were mailed, first-class, postage prepaid to James E. Farnham, Esq., Hunton & Williams, Riverfront Plaza, East Tower, 951 East Byrd Street, Richmond, Virginia 23219-4074.



Harold J. Bender, Esq.

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PAINEWEBBER, INCORPORATED, Plaintiff-Appellee	)	
v.	)	
BILLIE ALLEN; ELEANOR K. BENSON, a/k/a ELEANOR K. FULLER; CHARLES BROTMAN; ELIZABETH DOMINO; JOSEPH S. DOMINO; RUTH H. GRAY; BRUCE G. HARRIS; EDITH B. HARRIS; CONSTANCE N. KALKHOF; BARBARA B. LEWIS; ROBERT HALL LEWIS; JOAN F. McDONALD; MARIE O. NEWBERGER; GERTHA POLLARD; LINDA M. SAFYAN; VERNON LEE THOMPSON; CHARLES J. TONER, JR.; DELORES WEINBERGER; HAL WEINBERGER, a/k/a HAROLD WEINBERGER, Defendants-Appellants,	)	No. 93-1575
and	)	
E. JEAN METCALF, Defendant.	)	

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
James R. Spencer, District Judge.
(CA-92-591-R)

Argued: October 27, 1993

Decided: January 10, 1995

Before WIDENER and WILKINS, Circuit Judges, and SPROUSE, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Harold John Bender, BIFULCO, BENDER & SCARPITTI, Erie, Pennsylvania, for Appellants. Lonnie Dayton Nunley, III, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee. **ON BRIEF:** Wayne G. Johnson, GIFFORD, LAY & JOHNSON, Erie, Pennsylvania, for Appellants. James E. Farnham, HUNTON & WILLIAMS, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

The defendants in this case bought partnership interests in PaineWebber Equity Partners I Limited Partnership (EP-I), a Virginia limited partnership, from the plaintiff, PaineWebber, Inc. (PaineWebber). The defendants appeal from the district court's grant of summary judgment in favor of PaineWebber in its declaratory judgment action brought to bar arbitration of the defendants' claims by the National Association of Securities Dealers (NASD).

The facts, which are undisputed, are stated briefly as follows.[1] The defendants bought limited partnerships in EP-I prior to July 17, 1986. On July 17, 1992, the

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[1]The parties largely stipulated to the facts. See JA 204-14.

defendants filed a Statement of Claim with NASD against PaineWebber and sought arbitration of their claims, based on their purchase of partnerships in EP-I. The Statement of Claim, as amended, asserted several theories of recovery, including a claim based on violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 (RICO). NASD granted the defendants' request to arbitrate. PaineWebber then filed a complaint, seeking a declaratory judgment that the claims asserted by the defendants were not eligible for arbitration, pursuant to § 15 of the NASD Code of Arbitration, which states:

> Sec. 15. No dispute, claim or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim, or controversy. This section shall not extend applicable statutes

> of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

The defendants filed a motion to dismiss PaineWebber's complaint on grounds appealed here that the court lacked diversity jurisdiction under 28 U.S.C. § 1332 or other subject matter jurisdiction under the Federal Arbitration Act since that Act does not, in and of itself, create such jurisdiction. The district court denied the motion to dismiss, holding that it had diversity jurisdiction and the issue of arbitrability was "undeniably an issue for judicial determination." PaineWebber v. Allen, No. 3:92CV591, slip op. at 4 (E.D. Va. Nov. 12, 1992)(Order and Memorandum Opinion denying Motion to Dismiss), quoting AT&T Technologies, Inc. v. Commun-

ications Workers of America, 475 U.S. 643, 649 (1986).

The defendants filed a second motion to dismiss, pursuant to Fed. R. Civ. P. 19(b), claiming that PaineWebber failed to join one of the claimants who filed the Statement of Claims with NASD. Defendants contended that this claimant was an indispensable party who would, if joined, have defeated diversity jurisdiction. The district court held that the qualification of a person as a necessary party under Rule 19(a) was a prerequisite to dismissing an action under Rule 19(b) for failure to join an indispensable party. The district court found that the defendants did not demonstrate that the non-joined claimant was necessary under Rule 19(a)(2) in that she did not claim an interest relating to the subject of the action within the meaning of the Rule

because the limited partners were not in privity with one another with respect to the underlying investments, and an injunction against defendants would have no effect upon the non-joined investor's interest in EP-I. It also found that the non-joined investor's interest was adequately represented by the current parties to the litigation. Therefore, the district court denied the second motion to dismiss, finding that if the claimant was not a necessary party under Rule 19(a), she could not be an indispensable party under Rule 19(b). PaineWebber v. Allen, No. 3:92CV591, (E.D. Va. Mar. 16, 1993).

The parties filed cross-motions for summary judgment, with PaineWebber seeking a determination that the defendants' claims were not eligible for NASD arbitration and the defendants seeking a denial of PaineWebber's motion for summary

judgment, thus permitting NASD to arbitrate their claims. The district court granted summary judgment in favor of PaineWebber. As to the pre-sale claims of the defendants, the district court determined that the claims were not eligible for arbitration under NASD Code § 15, since the occurrence or event giving rise to the claim was the defendants' purchase of the limited partnership interests, which was more than six years prior to the arbitration demand. As for the RICO claim, the district court also applied the NASD § 15 eligibility requirement of six years from the sale date of EP-I limited partnerships to the claimants, and held that such a claim's alleged fraudulent occurrence or events relating to PaineWebber's sale of limited partnerships other than and subsequent to the sale of EP-I could not extend this

eligibility since none of the defendants invested in any PaineWebber limited partnerships offered subsequent to EP-I.

The defendants appeal, claiming error on the basis that 1) no subject matter jurisdiction existed under the Federal Arbitration Act, 9 U.S.C. § 1; 2) the applicable statute of limitations on a RICO claim is four years from the date the defendants discovered their injury and not NASD's six-year eligibility from the date of sale of EP-1; and 3) the district court erred in failing to dismiss PaineWebber's complaint upon learning that PaineWebber had, for the purpose of creating diversity jurisdiction, failed to join a party.

We review de novo the district court's decision granting summary judgment, Higgins v. E.I. DuPont de Nemours & Co., 863 F.2d 1162, 1166-67 (4th Cir. 1988), as well as the jurisdictional

questions here, see Charter Fed. Sav. Bank v. Office of Thrift Supervision, 976 F.2d 203, 208 (4th Cir. 1992), cert. denied, ____ U.S. ____, 61 U.S.L.W. 3667 (1993). Having performed such a review, we are of opinion that the district court correctly held that it had diversity jurisdiction and did not hold that the Federal Arbitration Act confers jurisdiction;[2] that non-joinder of the non-diverse claimant was proper; and that the NASD Code § 15 six-year eligibility from the date the defendants purchased their interests in EP-I properly governed the RICO claim of the defendants.

Therefore, we affirm on the basis of the district court's opinions noted above.

AFFIRMED

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[2]See Delta Fin. Corp. v. Paul D. Comanduras & Assoc., 973 F.2d 301, 303 n.1 (4th Cir. 1992).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAINEWEBBER INCORPORATED, Plaintiff,	)	
v.	)	Civil Action No. 3:92CV591
BILLIE H. ALLEN, et al., Defendants.	)	

ORDER

THIS MATTER is before the Court on cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated in the accompanying Memorandum Opinion, Plaintiff's Motion for Summary Judgment is hereby GRANTED and Defendants' Motion for Summary Judgment is DENIED.

WHEREAS Defendants are in violation of § 15 of the Code of the National Association of Securities Dealers, Inc. ("NASD"), none of Defendants' claims filed with the NASD, against PaineWebber

Incorporated, are eligible for arbitration.

And it is SO ORDERED.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: April 29, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

PAINEWEBBER INCORPORATED, Plaintiff,	)	
v.	)	Civil Action No. 3:92CV591
BILLIE H. ALLEN, et al., Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on cross motions for summary judgment pursuant to Fed. R. Civ. P. 56. For the reasons stated herein, Plaintiff's Motion for Summary Judgment is hereby GRANTED and Defendants' Motion for Summary Judgment is DENIED.

I.

Plaintiff in this matter is PaineWebber Incorporated ("PaineWebber"), a seller of partnership interests in PaineWebber Equity Partners I Limited

Partnership ("EP-1"), a Virginia limited partnership. The defendants ("Claimants") are purchasers of partnership interests in EP-I.

On July 17, 1992, Defendants filed a Statement of Claim with the National Association of Securities Dealers, Inc. ("NASD") against PaineWebber. This single consolidated claim involves the Claimants' purchase of interests in EP-I. Upon filing the claim, Defendants completed a Uniform Submission Agreement to initiate arbitration of the dispute. However, by stipulation before NASD the parties agreed to stay the NASD arbitration proceedings during the pendency of this action.

On September 10, 1992, PaineWebber filed the instant case seeking a permanent stay of arbitration and a declaratory judgment holding that the claims asserted in Defendants' demand for arbitration are

no longer eligible for arbitration. In support of its request for relief, PaineWebber alleges that defendants violated NASD Code § 15 by submitting their demand for arbitration more than six years after the last occurrence or event which could give rise to a dispute eligible for submission to arbitration. NASD Code § 15 provides in part: No dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.

In the cross motions for summary judgment, PaineWebber seeks a ruling, as a matter of law, that Defendants' claims are not eligible for arbitration. On the other hand, Defendants request this Court to refer this case back to NASD for

arbitration of the claims set forth in the original and amended Statements of Claim.

II.

The purpose of summary judgment is to facilitate the "prompt disposition of controversies on their merits without a[n] [unnecessary] trial, if in essence there is no real dispute as to the salient facts." Bland v. Norfolk & South. RR Co., 406 F.2d 863, 866 (4th Cir. 1969). "Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." E.E.O.C. v. Clay Printing Co., 955 F.2d 936, 944 (4th Cir. 1992) (citing Fed. R. Civ. P. 56(c)); Ballinger v. North Carolina Agric. Extension Serv., 815 F.2d 1001, 1004 (4th Cir. 1987), cert. denied, 484 U.S. 897 (1987). A genuine issue of material fact

exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). The movant bears the burden of offering proof of the absence of any genuine issues of material fact, Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 1552 (1986), and the Court must view the facts and the inferences drawn therefrom in the light most favorable to the nonmoving party. Ballinger, 815 F.2d at 1004. Once the movant has met his/her burden, and a properly supported motion is before the Court, the opposing party may not rest upon mere allegations or denials contained in his/her pleadings, Anderson, 477 U.S. at 248, 106 S.Ct. at 2510, but rather he/she must "set forth specific facts that show there is a genuine issue for trial."

Allstate Financial Corp. v. Financorp., Inc., 934 F.2d 55, 58 (4th Cir. 1991).

III.

In a Memorandum Opinion dated, November 12, 1992, this Court held that the issue of arbitrability, created by NASD Code § 15, is an issue to be decided by the Court, rather than the arbitrators. Every Circuit Court of Appeals which has addressed the issue has reached the same conclusion. Recent decisions of the Third, Sixth and Seventh Circuits, all conclude that NASD Code § 15 presents a substantive issue to be determined by the court rather than a procedural issue to be decided by the arbitrators. See PaineWebber Incorporated v. Hofmann, 984 F2.d 1372 (3rd Cir. 1993); Edward D. Jones & Co. v. Sorrells, 957 F2.d 509 (7th Cir. 1992); Roney & Co. v. Kassab, 981 F.2d 894

(6th Cir. 1992); and PaineWebber Incorporated v. Hartmann, 921 F.2d 507 (3rd Cir. 1990). Therefore, this Court possesses the requisite jurisdiction to determine whether Defendants' claims are eligible for arbitration pursuant to NASD Code § 15.

Claimants assert 11 separate theories of recovery in ¶¶ 6-16 of their Amended Statement of Claim, as supplemented by their Second Amended Statement of Claim. **Stip. Exs. 39 and 40.** With the exception of ¶ 15 of the Amended Statement of Claim, all of the other claims are based upon allegations relating to acts, omissions, or misrepresentations that occurred prior to sale of the limited partnership interests. Paragraph 15 alleges "mail and securities fraud" violations that allegedly constitute predicate offenses under the Racketeer Influenced and Corrupt

Organizations Act ("RICO"), 18 U.S.C. §§ 1961 et. seq. Accordingly, the Court will address the issue of arbitrability in two parts: pre-sale claims and RICO claims.

A. Pre-sale Claims

The primary issue raised by both parties is what constitutes the "occurrence or event," as set forth in NASD Code § 15, that gives rise to each of the Defendants' claims. It is the finding of the Court that the weight of authority supports PaineWebber's contention that the meaning of "occurrence or event", which triggers the six year eligibility provision for pre-sale claims, is the date Claimants' respective interests in the limited partnership were purchased. See, e.g., PaineWebber Inc. v. Hofmann, 984 F.2d 1372 (3rd Cir. 1993)(purchases that occurred more than six years before the arbitration demand are outside the six-

year period provided by § 15 of the NASD Code); Roney & Co. v. Kassab, 981 F.2d 894 (6th Cir. 1992)(courts must enjoin the arbitration of claims where the alleged wrongdoing occurred more than six years prior to the filing of the claims); Painewebber, Inc. v. Hartmann, 921 F.2d 507 (3rd Cir. 1990)(the six-year eligibility period bars all claims from arbitration where claimants last transactions with the brokerage house occurred more than six years before the filing of the arbitration); Castellano v. Prudential-Bache Securities, Inc., No. 90 Civ. 1287, 1990 WL 87575 (S.D.N.Y. June 19, 1990)(court should affirm NYSE holding that the "occurrence or event giving rise to the dispute" is the purchase date of the investment and not the date when the purchaser discovered "problems" with the investment).

Having established the date of purchase as the event which triggers the six year eligibility provision for the pre-sale claims, the Court must determine whether more than six years elapsed between the date Claimants' interests were purchased in EP-I and the filing of the Statement of Claim on July 17, 1992. The evidence indicates that as to all Defendants, the claims filed with the NASD were submitted more than six years subsequent to the dates their respective interests in EP-I were purchased. The Court thus finds, that none of Defendants' pre-sale claims are eligible for arbitration, as Claimants violated NASD Code § 15.

The Court further finds that NASD Code § 15 is not a statute of limitations which can be tolled by the principles of equitable estoppel. Claimants argue, for

various reasons, that the principles of equitable estoppel should apply to toll the running of the six year eligibility provision. However, as a matter of law, tolling does not apply to NASD Code § 15. See Caviness v. DeRand Resources Corp., 983 F.2d 1295 (4th Cir. 1993)(three year statute of repose is not subject to tolling); Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992)(section 15 is an eligibility requirement, not a statute of limitations, and thus cannot be tolled).

B. RICO Claims

On December 31, 1992, Claimants filed their Second Amended Statement of Claim, attempting to expand the list of possible occurrences or events giving rise to the alleged RICO violations. Defendants attempt to create occurrences or events after July 17, 1986, by incorporating into

this case, alleged occurrences or events relating to other limited partnerships offered for sale by PaineWebber on dates subsequent to the EP-I offering. There is no evidence that any of the Claimants were investors in any PaineWebber limited partnerships offered subsequent to EP-I.

It is the finding of the Court that such attempt at "integration of claims" is not permissible. See Caviness v. DeRand Resources Corp., 983 F.2d 1295 (4th Cir. 1993). Claimants cannot circumvent the eligibility provision by linking occurrences or events, unrelated to Defendants, under the guise of establishing a RICO claim. The alleged predicate acts must be within the same conspiracy.

Thus, Claimants RICO claims are likewise not eligible for arbitration. The claims were filed more than six years

subsequent to the date the limited partnership interests were purchased.

IV.

Whereas the Court finds that there are no genuine issues of material fact, and as a matter of law, Plaintiff is entitled to Summary Judgment, the Court will GRANT Plaintiff's Motion for Summary Judgment and DENY Defendants' cross Motion for Summary Judgment.

An appropriate Order will issue.

/s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: April 29, 1993

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 6, 1995

No. 93-1575
CA-92-591-R

PAINEWEBBER, INCORPORATED

Plaintiff - Appellee

v.

BILLIE ALLEN; ELEANOR K. BENSON, a/k/a Eleanor K. Fuller; CHARLES BROTMAN; ELIZABETH DOMINO; JOSEPH S. DOMINO; RUTH H. GRAY; BRUCE G. HARRIS; EDITH B. HARRIS; CONSTANCE N. KALKHOF; BARBARA B. LEWIS; ROBERT HALL LEWIS; JOAN F. MCDONALD; MARIE O. NEWBERGER; GERTHA POLLARD; LINDA M. SAFYAN; VERNON LEE THOMPSON; CHARLES J. TONER, JR.; DELORES WEINBERGER; HAL WEINBERGER, a/k/a Harold Weinberger

Defendants - Appellants

and

E. JEAN METCALF

Defendant

- - - - - - - - - - - - - - -

O R D E R

- - - - - - - - - - - - - - -

Appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/ Bert M. Montague

CLERK

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
February 13, 1995

No. 93-1575
CA-92-591-R

Painewebber Inc. v. Allen

M A N D A T E

The judgment of this Court dated 1/10/95 takes effect today.

BERT M. MONTAGUE
CLERK

Supreme Court, U.S.
FILED
JUN 30 1995
OFFICE OF THE CLERK

No. 94-1831

In The Supreme Court of the United States

October Term, 1995

Billie H. Allen, *et al.*,
Petitioners,

v.

PaineWebber, Incorporated,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

James E. Farnham *
Edward J. Fuhr
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
* *Counsel of Record*

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

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COUNTERSTATEMENT OF QUESTION PRESENTED

Did the court of appeals correctly affirm the district court's determination, made on cross motions for summary judgment, that Allen's claim was ineligible for arbitration under § 15 of the National Association of Securities Dealers, Inc. Code of Arbitration Procedure ("NASD Code"), where Allen failed to challenge the district court's authority under NASD Code § 15 to make this determination until filing a petition for rehearing with the court of appeals?

PARTIES TO THE PROCEEDING

The petitioner is Billie H. Allen, *et al.*, ("Allen"). The respondent is PaineWebber, Inc. ("PaineWebber").

LISTING OF AFFILIATES PURSUANT TO RULE 29.1

Pursuant to Rule 29.1, Respondent PaineWebber, Incorporated advises that there is no parent or subsidiary company to be listed.

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IN THE

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OCTOBER TERM, 1995

No. 94-1831

BILLIE H. ALLEN, *et al.*,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

CODE PROVISION INVOLVED

Section 15 of the NASD Code was the central issue raised in the district court and is the subject now of Allen's Petition. That section contains a specific eligibility provision:

> No dispute, claim, or controversy shall be eligible for submission to arbitration under this code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy. This section shall not extend applicable statutes of limitations, nor shall it apply to any case which is directed to arbitration by a court of competent jurisdiction.

COUNTERSTATEMENT OF THE CASE

Allen's statement of the case is replete with material misstatements and omissions of the convoluted but important procedural history of this matter. PaineWebber, therefore, believes it is necessary to submit this counterstatement.

On July 17, 1992, twenty-one individuals (collectively, Claimants), commenced an arbitration proceeding before the National Association of Securities Dealers ("NASD"). The Claimants included Billie H. Allen, the name claimant, and E. Jean Metcalf. In their Amended Statement of Claim [1] against PaineWebber, Claimants alleged several theories of recovery, including claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 ("RICO"). Claimants alleged they had been damaged as a result of purchasing limited partnership interests in PaineWebber Equity Partners I ("EP-I"), a Virginia limited partnership.

Claimants requested that the NASD conduct the arbitration in Richmond, Virginia, since EP-I was a Virginia business entity. The NASD Director of Arbitration granted this request and so notified the Claimants and PaineWebber. Each claimant executed and filed with the NASD a Uniform Submission Agreement expressly requesting that the controversy be submitted to arbitration in accordance with the NASD Code of Arbitration.

All of the claims presented by Claimants arose out of their purchases of EP-I limited partnership interests more than six years prior to the time the arbitration proceeding was filed. NASD Code § 15 provides, however, that claims are "[not] eligible for submission to arbitration . . . where six (6) years have elapsed from the occurrence or event giving rise to the [claims]."

---

[1] There is no record of any Statement of Claim being filed before the Amended Statement of Claim.

On September 10, 1992, PaineWebber commenced a declaratory judgment action in the United States District Court for the Eastern District of Virginia, Richmond Division (the district court). In that action, PaineWebber sought a declaratory judgment enjoining the arbitration on the ground that the claims asserted by the Claimants were ineligible for arbitration. PaineWebber argued that the claims were based on events which occurred more than six years prior to the date on which Claimants initiated the arbitration proceeding before the NASD.

In October of 1992, Claimants filed their first motion to dismiss. Several alternative grounds were asserted, including the assertion that the district court lacked subject matter jurisdiction because "there [was] no written predispute agreement between the parties as required by the Federal Arbitration Act." The district court denied this motion. In December of 1992, Allen filed a Second Motion to Dismiss. This motion asserted that there was no diversity jurisdiction because PaineWebber had failed to join an indispensable party. The district court also denied this motion.

On December 31, 1992, Claimants filed a Second Amended Statement of Claim in the NASD arbitration. The plain purpose and effect of this filing was to substantially expand and embellish the RICO claims.

Thereafter, the parties to the district court proceeding entered into an extensive Stipulation of Fact encompassing some seventy-one paragraphs of text and several hundred pages of exhibits. The parties then filed cross-motions for summary judgment on the issue of whether the claims set forth in the Second Amended Statement of Claim were "eligible" for arbitration in light of the provisions of § 15 of the NASD Code.

In an Order and Memorandum Opinion of April 29, 1993, the district court granted the PaineWebber Motion for Summary Judgment and held that all of the claims presented in the First and Second Amended Statement

of Claims were ineligible for arbitration. Pet. App. 11-26. The district court further held that "NASD Code § 15 is not a statute of limitations which can be tolled by the principles of equitable estoppel." *Id.* All of the defendants except E. Jean Metcalf appealed to the Fourth Circuit.

On appeal, Allen claimed error on three bases: (1) the district court lacked subject matter jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (It was this issue that Allen presented in his first motion to dismiss to the district court); (2) as a matter of substantive law, the six year eligibility provision in § 15 should not preclude arbitration of the RICO claims because the applicable statute of limitations is four years from the date that the defendants discovered their injury. (This issue was presented to the district court in the parties' cross motions for summary judgment); and (3) the district court erred in declining to dismiss PaineWebber's complaint because PaineWebber had failed to join a necessary party in order to create diversity jurisdiction. (It was this issue that Allen presented in his second motion to dismiss to the district court).

On January 10, 1995, the Fourth Circuit summarily rejected all of Allen's arguments in an unpublished *per curiam* opinion. The Court concluded that the district court had correctly held "that it had diversity jurisdiction and did not hold that the Federal Arbitration Act confers jurisdiction." Pet. App. 10.

On January 23, 1995, Allen filed a petition for rehearing to the Court of Appeals suggesting for the first time that the district court not only had decided the eligibility issue incorrectly, but also had erred in reaching the issue under NASD Code § 15. Allen argued for the first time to the Fourth Circuit that "the majority of circuits . . . [had held] that the eligibility question of § 15 . . . was a question for the arbitrators." Petition for Rehearing at 3. The Fourth Circuit denied the Petition for Rehearing

without explanation on February 6, 1995. On February 13, 1995, the court issued a mandate to effect its judgment.

After the April 29, 1993, decision by the district court, and prior to any resolution in the Fourth Circuit, E. Jean Metcalf, the arbitration claimant who had withdrawn from the appeal to the Fourth Circuit, filed a putative class action proceeding in the United States District Court for the Western District of Pennsylvania, Erie Division. The same counsel who represented Metcalf in the NASD arbitration and in the district court action in Virginia, also represented her in the Pennsylvania action. Metcalf filed the Pennsylvania action on May 17, 1993, on behalf of herself and all others who had purchased EP-I. The *Metcalf* class action asserted only RICO claims, the same claims that had been asserted in the arbitration action before the NASD.

PaineWebber moved to dismiss the Pennsylvania action for failure to allege any facts from which a court or jury could find that PaineWebber violated RICO. Plaintiff requested and took limited discovery in order to respond to the Motion to Dismiss. Plaintiff then filed briefs in opposition to PaineWebber's Motion as well as a request for leave to file an Amended Complaint. In an Order and twenty-eight page Memorandum Opinion of May 11, 1995, the Pennsylvania district court granted the Motion to Dismiss. It further denied leave to amend on the ground that Metcalf's proposed amendment would not cure her Complaint's fatal defects. Metcalf filed a motion to alter or amend the judgment; this motion was denied by order dated May 23, 1995. Metcalf has filed a notice of appeal to the Third Circuit.

Accordingly, the claims presented in the underlying action have been presented, or are currently being pursued, before the NASD, United States District Court for the Eastern District of Virginia, the Fourth Circuit Court of Appeals, United States District Court for the Western District of Pennsylvania, the Third Circuit Court of Appeals and the United States Supreme Court.

REASONS FOR DENYING THE WRIT

The Court should deny the petition for certiorari for two reasons. First, Allen did not raise the arbitrability issue presented by this petition in his appeal to the Fourth Circuit, and thus the circuit court did not address the issue. Second, an unpublished *per curiam* opinion from the Fourth Circuit, affirming a district court decision on cross-motions for summary judgment, is not an appropriate vehicle for addresing the constellation of issues surrounding the question presented for review. While the authorities cited by Allen do not support his contention that there is a conflict between the circuits, the Fifth Circuit has recently issued an opinion that could be construed as contrary in some respects to the holdings of the Third, Sixth and Seventh Circuits. These holdings were expressly relied on by the district court for the proposition that the issue of arbitrability is reserved to the courts under NASD Code § 15. Because the Fourth Circuit did not address this issue, the Fifth Circuit decision does not contradict the Fourth Circuit's holding. Moreover, a careful review of the Fifth Circuit decision suggests that Allen's claims could have been held barred even if litigated in the Fifth Circuit.

I. ALLEN HAS NOT PROPERLY PRESERVED THE ISSUE BELOW THAT HE NOW RAISES IN THE PETITION FOR CERTIORARI

In his appeal to the Fourth Circuit, Allen did not dispute the district court's authority to determine arbitrability under NASD Code § 15. By failing to contest the district court's resolution of this matter, Allen waived the issue on appeal. *See Rosenberger v. Rector & Visitors of the Univ. of Virginia.*, 18 F.3d 269, 276 (4th Cir.), *cert. granted*, 115 S. Ct. 417 (1994) (Because the plaintiff did not argue the point on appeal, "we are therefore compelled to conclude that the parties have failed to appeal [the issue]. Failure of this nature constitutes aban-

donment of the claims and precludes us from considering them further herein.").

After the Fourth Circuit issued its *per curiam* opinion rejecting Allen's assignments of error, Allen filed a petition for rehearing to the Fourth Circuit. As detailed above, it was in this petition that he first raised the issue of whether the district court or the arbitrator determines arbitrability under NASD Code § 15. Although the court denied the petition for rehearing without explanation, it is well-established that a rehearing will not be granted on an issue first raised in the petition for rehearing. *See Joseph v. Blair*, 488 F.2d 403, 404 (4th Cir. 1973) ("The suggestion [of an alternative basis for application of *Younger*] is made first in the petition for rehearing, and we think it comes too late."); *see also Costo v. United States*, 922 F.2d 302, 302-03 (6th Cir. 1990) ("Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing.")

Because Allen did not challenge the district court's authority under NASD Code § 15 to determine eligibility of the dispute for arbitration in his appeal, the parties did not brief the issue and the Fourth Circuit did not address it. Absent exceptional circumstances not present in this case, this Court does not and should not decide the merits of an issue not considered below. *EEOC v. FLRA*, 476 U.S. 19, 24 (1986) (per curiam) ("Our normal practice . . . is to refrain from addressing issues not raised in the Court of Appeals.").

II. THE ISSUE PRESENTED DOES NOT MERIT SUPREME COURT REVIEW AND IN ALL EVENTS THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR DECIDING THE ISSUE

The cases cited by Allen do not establish a split between the circuit courts on the question whether a court or an arbitrator determines the eligibility of a dispute for

arbitration under NASD Code § 15. Allen cites only three circuit court cases construing the eligibility provision of NASD Code § 15. All three held that the plain language of § 15 requires that courts, not arbitrators, determine the eligibility of a dispute for arbitration. *Roney & Co. v. Kassab*, 981 F.2d 894, 898-99 (6th Cir. 1992) (adopting the reasoning of the Seventh Circuit "that the word 'eligible' must be given its plain and literal meaning"); *Edward D. Jones & Co. v. Sorrells*, 957 F.2d 509, 513 (7th Cir. 1992) (declining to reconsider its earlier holdings "that NASD Section 15 operates as an eligibility requirement which bars from arbitration claims submitted more than six years after the event which gave rise to them."); *PaineWebber, Inc. v. Hartmann*, 921 F.2d 507, 513-14 (3rd Cir. 1990) (the "plain language" of six year eligibility provision "unambiguously supports . . . the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to the harm").

Allen's citation to other cases is irrelevant to the issue before this Court for the simple reason that none of these cases construe the eligibility provision of NASD Code § 15.[2] These cases merely affirm the unexceptional principle that arbitrators resolve procedural disputes in matters properly before the arbitrators.

Forty-five days before Allen filed his petition for certiorari, however, the Fifth Circuit issued an opinion, not cited by Allen, that cannot be harmonized completely with the circuit court opinions relied on by the district court. *See Smith Barney Shearson, Inc. v. Boone*, 47 F.3d 750, 754 (5th Cir. 1995). In that opinion the

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[2] *See Automotive, Petroleum & Allied Indus. Employees Union, Local No. 618 v. Town & Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983); *Belke v. Merrill Lynch, Pierce, Fenner & Smith*, 693 F.2d 1023 (11th Cir. 1982); *O'Neel v. National Ass'n of Sec. Dealers, Inc.*, 667 F.2d 804 (9th Cir. 1982); *Conticommodity Serv., Inc. v. Phillipp & Lion*, 613 F.2d 1222 (2nd Cir. 1982); *Hanes Corp. v. Millard*, 531 F.2d 585 (D.C. Cir. 1976).

Court held that "the timeliness issues raised in this case" are ones that "must be decided by the arbitrator." *Id.* Yet the Fifth Circuit opinion is not consistent with the argument advanced by petitioners because the Fifth Circuit recognized that in certain circumstances courts do have authority under NASD Code § 15 to enjoin arbitration. In his petition to this Court, Allen contends that the courts have no role in making the threshold decision as to arbitrability.

The *Boone* court also went to considerable length to narrow the breadth of its holding. First, the Court noted that the proposition that eligibility provisions are prerequisites to an arbitrator's jurisdiction was one that enjoyed "some support." *Id.* at 754. Next, the Court declared repeatedly that it was unclear to the Court whether the plaintiff's claims had in fact been brought within six years of the event giving rise to the claims because there was "some controversy as to when the last act or occurrence giving rise to the claims . . . took place." *Id.* "There is some dispute as to the effect of the time bars." *Id.* The Court concluded, "[t]hus, there is substantial controversy over whether the time bars will act to bar the causes of actions asserted. . . ." Again, the Court reiterated the significance of the muddled state of the factual record when the court affirmed that it would enjoin arbitration if "the time bars cited by [defendants] will absolutely bar arbitration. . . ." *Id.*

In the case now before this Court, the district court and the Fourth Circuit determined that Allen's claims are barred by the six year eligibility provision. The district court found that all of Allen's claims "were submitted more than six years subsequent to the dates their respective interests in EP-I were purchased." Pet. App. 22. On appeal, the Fourth Circuit affirmed this finding. Pet. App. 10. Allen has not challenged this finding in his petition to this Court.

Given the determination of the district court in this case that more than six years had elapsed since the occurrence giving rise to the claims stated, it is likely that, if the Fifth Circuit had been asked to review the decision of the Virginia district court, it would have affirmed the decision of the district court enjoining arbitration.

In contrast to the equivocal holding of the Fifth Circuit, the Supreme Court has held that, "the question of arbitrability . . . is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 647 (1986).

Similarly, other circuit courts have announced emphatically that the "eligibility for submission" language found in NASD Code § 15 and NYSE Rule 603 reserves the question of arbitrability to the courts. *See, e.g., Paine Webber, Inc. v. Hartmann,* 921 F.2d 507 (3rd Cir. 1990). There, the *Hartmann* Court observed first that interpretations of such Code provisions requires the "interpretation of contractual language to discern contractual intent." *Id.* at 510. As such, it "is a question of fact" in which appellate "review is limited to a determination whether the district court's findings are clearly erroneous." *Id.*

The Court proceeded to detail the reasons it concurred in the judgment that arbitrability decisions are reserved to the courts:

> First, the plain language of Rule 603 states that after six years from the event giving rise to a dispute have elapsed, the dispute shall [not] be *eligible* for *submission* to arbitration. 'Eligible' is defined as 'fitted or qualified to be chosen or used' or 'worthy to be chosen or selected.' *Webster's Third New International Dictionary* 736 (1966). 'Submission' is

> defined as the act of 'commit[ting something] for consideration, study, or decision.' *Id.* at 2277. Interpolating these definitions into the text of Rule 603, the relevant portion of the rule would state that, after six years, a dispute 'shall [not] be worthy to be chosen or selected for [the] consideration, study, or decision [of arbitration].' We think this expanded reading of Rule 603 unambiguously supports PaineWebber's argument and the district court's conclusion that the parties intended to bar from arbitration disputes raised more than six years after the events giving rise to them.
>
> Second, the only other appellate court to interpret, in a similar context, language identical to Rule 603—namely that found in Sect. 15 of the [NASD Code]—reached the same conclusion as we. In *PaineWebber, Inc. v. Farnam,* 870 F.2d 1286, 1292 (7th Cir. 1989), the Seventh Circuit also reasoned that the word 'eligible' must be given its plain and literal meaning and interpreted as absolutely barring stale disputes from reaching arbitration. It is interesting to note, additionally, that the *Farnam* court based its decision, in part, on a letter, written in 1988, in which an NASD staff attorney stated that the organization intended Sect. 15 to function as "an eligibility requirement rather than a statute of limitations" . . . .
>
> Third, the language of Rule 603 stands in stark contrast to that found in the [statute of limitations] cases cited by [appellant].

Id. at 513. These statute of limitations cases that the *Hartmann* court expressly distinguished and found inapplicable are the same cases that Allen now relies on in his petition to this Court.

In sum, the reasoning of the district court in this case, which was not challenged in the Fourth Circuit, is amply and persuasively supported by virtually every other court that has considered the issue of arbitrability. This Court therefore should deny Allen's petition, particularly where

this Court does not have the benefit of the Fourth Circuit's analysis of the issue. An unpublished *per curiam* opinion is not an appropriate vehicle for review by this Court.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JAMES E. FARNHAM *
EDWARD J. FUHR
HUNTON & WILLIAMS
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219
(804) 788-8200
* *Counsel of Record*